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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-911

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*

No. 78-1036

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ANACONDA COMPANY AS AMICUS CURIAE

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The Anaconda Company respectfully tenders this brief as *amicus curiae* for consideration of the Court. Anaconda supports the position presented by the American Petroleum Institute and urges the Court to uphold the decision of the United States Court of Appeals for the Fifth Circuit in this case.

THE INTEREST OF THE ANACONDA COMPANY

The OSHA cancer policy at issue in this case has been applied to The Anaconda Company and other copper producers who are challenging this policy in the United States Court of Appeals for the Ninth Circuit, which has deferred action pending decision of this case.[1] Thus the Court's decision here will directly affect the copper industry. Indeed, the effect on the copper industry may be greater than that involved for some of the industrial parties to this case because application of OSHA's cancer policy to the copper industry raises questions of feasibility more severe than the Solicitor admits here.[2]

OSHA's policy of setting the lowest standard thought feasible for carcinogens has been reviewed in several circuits with widely varying results. The pertinent statutory provisions are subject to conflicting interpretations as to what must go into OSHA's decision when it sets a standard and how much of that decision is reviewable by a court. The Solicitor's Brief is narrowly drawn to deal solely with the decision below, but the split between the circuits is much wider than such limited treatment reveals, and deserves further analysis in reaching resolution of this case. This brief is devoted to such analysis.

[1] *The Anaconda Company, et al.* v. *OSHA*, No. 78-2764, and *ASARCO Inc., et al.* v. *OSHA*, No. 78-1959. These cases challenge OSHA's arsenic standard, 29 C.F.R. 1910, 43 Fed. Reg. 19584 *et seq.*

[2] The Brief for the Federal Parties (hereinafter cited as "Solicitor's Brief") at pages 57-58 n. 50, asserts that economic feasibility is not in issue in this case, though it is a principal issue in the arsenic case. However, economic feasibility is a question of degree, and is necessarily involved to some degree in assessment of the OSHA cancer policy.

I. The Split In The Circuits Is Wider Than The Solicitor Suggests.

The Solicitor urges in his brief that the circuits are split as to whether the Secretary must explicitly balance costs against benefits when promulgating toxic materials standards. Solicitor's Brief at 42 & n.35. The Solicitor argues that the Fifth Circuit has required such balancing in the present case.[3] In contrast, the Second, Third, and D.C. Circuits require no further consideration of benefits once it has been shown that there may be no safe level of exposure to a proven carcinogen, focusing thereafter entirely upon the feasibility of the particular standard. See *American Iron & Steel Institute* v. *OSHA*, 577 F.2d 825, 831 (3d Cir. 1978), petitions for cert. pending, Nos. 78-918 and 78-919; *Society of Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301, 1308-09 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975); *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 475, 477-78 (D.C. Cir. 1974).

However, most circuits that have considered OSHA standards have required a cost-benefit balance in some situations. The courts have found two statutory pegs upon which to hang the requirement in those

[3] *American Petroleum Institute* v. *OSHA*, 581 F.2d 493, 503 (1978). The Solicitor may read too much into this opinion as to cost-benefit. The opinion seems more concerned with the Secretary's failure to weigh medical evidence properly. However, this brief will treat the Solicitor's argument as made, leaving to the parties discussion of whether the Solicitor has over-emphasized the cost-benefit language in the opinion below.

cases: (1) a reasonable necessity requirement; or (2) a feasibility requirement. The Eighth Circuit's rule is based upon both reasonable necessity and feasibility. See *United Parcel Service of Ohio, Inc.* v. *OSHRC*, 570 F.2d 806, 811-12 (1978). The Third and Fifth Circuits focus upon reasonable necessity. For example, the Third Circuit held that the Secretary may properly weigh the economic consequences of a national consensus standard against its effectiveness in deciding whether a change in the standard is necessary to better effectuate the purposes of the Act. 530 F.2d at 123. In a later discussion of that case, the court affirmed that "[T]he Secretary's rulemaking task comprehends weighing the competing considerations of economic burden and improvement of safety." *Atlantic & Gulf Stevedores* v. *OSHRC*, 534 F.2d 541, 548 (3d Cir. 1976). The Fifth Circuit has held likewise. See *Florida Peach Growers Association* v. *Department of Labor*, 489 F.2d 120, 129-30 (5th Cir. 1974).[4] In contrast, the Sixth and Seventh Circuits require cost-benefit balancing whenever feasibility must be considered. This requirement was clearly stated in *Turner Co.* v. *Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977):

> ". . . we hold that the word 'feasible' . . . must be given its ordinary and common sense meaning of

[4] The Second Circuit might possibly be added to this list. In *Associated Industries of New York State, Inc.* v. *Department of Labor*, 487 F.2d 342 (2d Cir. 1973), the court, in ruling on the necessity of a national consensus standard, held that "when the Department imposes a standard considerably more stringent than that which has apparently been found satisfactory by many states with a long history of protection to industrial workers . . . then it has an obligation to produce some evidence justifying its action." 487 F.2d at 352-53.

> 'practicable.' This construction is in accord with the clear intent of Congress and the purpose of the Occupational Safety and Health Act. Accordingly, the Commission erred when it failed to consider the relative cost of implementing engineering controls . . . versus the effectiveness of an existing personal protective equipment program . . . ." 561 F.2d at 83-84.

Accord. *RMI Co.* v. *Secretary of Labor*, 594 F.2d 566, 571-72 (6th Cir. 1979).

These cases in which the circuits have required a cost-benefit analysis hold the key to the split on permanent toxic materials standards. The Fifth Circuit, in the present case, has extended the reasonable necessity rationale to require balancing in that context. 581 F.2d at 503. While the Sixth and Seventh Circuits have as yet considered no permanent toxic materials standards, the feasibility basis of the cost-benefit balance they have required in other OSHA cases mandates extension of the requirement to cases involving permanent toxic materials standards.[5] Conversely, although the Second, Third and D.C. Circuits have implicitly rejected a cost-benefit balancing requirement

[5] A close look at the decisions of these circuits confirms this view. Though the Seventh Circuit in *Turner Co.* was construing "feasible" as used in the standard under review and not the Act itself, it clearly considered its construction to be "in accord with the clear intent of Congress and the purpose of the Occupational Safety and Health Act." 561 F.2d at 83, 85. The Sixth Circuit in *RMI Co.* tied its feasibility definition directly to the feasibility requirement of section 6(b)(5). 594 F.2d at 571. Neither of these decisions comes close to holding, as the Solicitor suggests, that a "ban on 'life-threatening hazards' such as industrial carcinogens would not be subject to any cost-benefit test . . . ." See Solicitor's Brief at 42 n.35.

based upon feasibility, they have not considered the reasonable necessity rationale.[6]

Thus, the Solicitor's suggestion that the only disagreement on the cost-benefit balancing issue is between the Fifth Circuit and all other circuits ignores at least two basic disagreements lurking beneath the surface of this issue: the potential split between the Fifth Circuit and the Third Circuit as to the extension of the reasonable necessity rationale to cases involving permanent toxic materials standards, and, more importantly, the split between the circuits that construe the Act's feasibility requirement as mandating a cost-benefit balance and those that construe it to

[6] The Fifth Circuit expressly mentioned this fact in its opinion below. 581 F.2d at 505. There is some reason to believe that the Third Circuit might prove receptive to the reasonable necessity rationale. As previously mentioned, it has accepted the rationale in the context of other types of OSHA standards. See page 4, *supra*. Moreover, in *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F.2d 98, 107 (3d Cir. 197e), the court vacated an emergency temporary toxic materials standard because the Secretary had failed to explain why the particular standard chosen was necessary to protect employees. Conversely, in *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, 503 F.2d 1155 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975) ("SOCMA I"), the Court failed to discuss petitioner's contention that the particular standard chosen by the Secretary was unnecessary to protect workers. 503 F.2d at 1157. That case, however, involved a permanent toxic materials standard and petitioners failed to direct the court's attention to any statutory requirement of reasonable necessity. *Id.* The court has elsewhere noted that the Secretary "has an affirmative burden to demonstrate the reasonableness" of all standards subject to judicial review under the Act. *Atlantic & Gulf Stevedores* v. *OSHRC*, 534 F.2d 541, 551 (3d Cir. 1976).

In view of its decision in *Associated Industries*, the Second Circuit might likewise prove receptive to the reasonable necessity rationale. See note 4, *supra*, page 4.

require consideration of costs only, making the meaning of the Act's feasibility requirement an important issue in this case.

II. The Secretary's Feasibility Determinations Should Be Expressly Subjected To The Act's Substantial Evidence Requirement.

Anaconda believes that the briefs of the parties will adequately explore the issue whether the reasonable necessity or feasibility mandates of the Act require the Secretary to balance the costs of a standard against its benefits. However, if the Court were to construe "feasible" as requiring consideration of costs only and uphold the Secretary's "lowest feasible level policy," as the Solicitor urges, the propriety of the Secretary's determination of costs would become tbe central issue in nearly all toxic materials cases.[7] Thus, it is important that the Court, in passing upon these issues, be aware of the ways in which this determination has been made.

A. *The Secretary Has Not Always Applied The Solicitor's Concept of Feasibility.*

The Secretary has applied a concept of feasibility far more stringent than that described in the Solicitor's brief. According to the Solicitor, cost considerations "necessarily play a substantial role in the Secretary's determination that a particular level of ex-

[7] The Solicitor confirms that the policy has been applied in almost all toxic materials cases because the Secretary has been unable to determine a safe level of exposure for such substances. Solicitor's Brief at 72-73.

posure is feasible." Solicitor's Brief at 57 n.50. "Feasible" is variously defined as "practicable," "achievable at bearable cost with available technology," and "capable of being achieved at acceptable cost." *Id.* at 55, 57, 58. A policy embracing these concepts of feasibility is alleged to have been applied in all eight toxic materials cases, with a citation to a footnote in which seven of the eight are listed as proof of consistent application. *Id.* at 72, 21 & n.24. The arsenic case is conspicuously absent from this list, as well it might be, for the concept of feasibility applied in that case bears little resemblance to any of the above descriptions.

The arsenic case offers a prime example of the way in which such vague phrases as "bearable cost," "acceptable cost," and "available technology" can be so convoluted as to render the feasibility determination upon which the Solicitor places so much dependence entirely meaningless. The arsenic standard is purportedly based solely upon feasibility. 43 Fed. Reg. 19600-01 (May 5, 1978). However, feasibility is defined as "the lowest level achievable through engineering controls and work practices in the majority of locations." 43 Fed. Reg. 19601. Further text explains that Anaconda and other copper companies processing ore containing significant amounts of arsenic will not be able to achieve compliance by use of engineering controls and work practices. 43 Fed. Reg. 19601-04. These companies, which account for approximately half of the industry's annual tonnage of concentrates, are to install all feasible equipment, adopt all feasible protective work processes, and compensate for their inability to meet the standard by requiring workers to wear respirators. *Id.* Respirators, however,

are considered undesirable and are to be used only on a temporary basis: the companies will ultimately be required to meet the standard. *Id.* Progress toward this end is to be supervised by OSHA on a case-by-case basis under the Act's enforcement provisions, which prescribe civil and criminal penalties. In short, the Secretary has established a standard which he admits is technologically infeasible for smelters with significant amounts of arsenic in their feed—the only ones for which "feasibility" is really an issue—and is subjecting the companies to an enforcement program placing them at the mercy of subjective future decisions of feasibility.

This approach to feasibility bears no resemblance to the concept as described in the Solicitor's brief. How can the costs of reaching a given exposure level be "bearable" or "acceptable" when the required technology is not even "available"? If the technology needed to comply with a standard is unknown, certainly its costs cannot be known. As a result, Anaconda and fully half of the copper industry are subjected to an open-ended obligation to spend whatever the Secretary may require in the future in an effort to meet an infeasible standard. This presents these companies with immediate practical problems because the risk of incurring such unknown costs in the future must be accounted in deciding whether to make additional expenditures today. Few companies can afford the luxury of making substantial investments today subject to an undefined obligation to spend additionally whatever the Secretary may require tomorrow in pursuit of compliance with an infeasible standard. Certainly Anaconda can afford no such luxury. Just as certainly, this approach cannot be

squared with the concept of feasibility as defined by the Solicitor.

B. *Congress Intended To Require Feasibility Decisions To Be Made On The Basis Of Substantial Evidence.*

Under the Act, determinations made by the Secretary are conclusive only if supported by "substantial evidence in the record considered as a whole." 29 U.S.C. §655(f)(1975). This provision is fully applicable to all standard-setting determinations, including the feasibility determination required by Section 6(b)(5). See, *e.g., Florida Peach Growers Association* v. *Department of Labor*, 489 F.2d 120, 126 (5th Cir. 1974); *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 472, n.11 (D.C. Cir. 1974). The precise meaning of the substantial evidence standard in the context of setting occupational safety and health standards, however, has been subject to some question in the courts of appeal. Given the impossibility of knowing what standard, if any, is truly needed to protect workers in some cases, it is understandable that some courts label decisions in this area "policy making" or "legislative" or "on the frontier of scientific knowledge" and exclude them from the substantial evidence test Congress has prescribed for review of OSHA standards.[8]

Regardless of the propriety of this approach to decisions involving health effects, it clearly cannot ap-

[8] See, *e.g., AFL-CIO* v. *Brennan*, 530 F.2d 109, 115-16 (3d Cir. 1975); *Society of Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975); *Industrial Union Dep't, AFL-CIO* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

ply to feasibility decisions. In the first place, even the most "liberal" courts have strictly applied the substantial evidence standard to all "factual matters subject to evidentiary development." See, *e.g., IUD* v. *Hodgson*, 499 F.2d at 475-76; *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, 503 F.2d 1155, 1160 (3d Cir.), *cert. denied*, 420 U.S. 973 (1975) ("SOCMA I"). One could hardly imagine matters more clearly within this category than economic and technological feasibility.

More importantly, the legislative history of Section 655(f) (original Section 6(f)) clearly indicates that Congress intended the substantial evidence standard to be strictly applied to all of the Secretary's decisions in setting standards under the Act. The differing House and Senate versions of the legislation considered by the Conference Committee provided for different standards of judicial review. Section 6(f) of the Senate bill provided for pre-enforcement judicial review of standards but specified no standard for review; thus, presumably, the governing standard would have been the standard applicable to rulemaking under the Administrative Procedure Act. S. 2193, 91st Cong., 2d Sess. §6(f) (1970). As the bill did not require the Secretary to promulgate standards "on the record after opportunity for an agency hearing," the "arbitrary and capricious" standard would bave been applicable under Section 706(A)(2), 5 U.S.C. §706(A)(2). The committee report accompanying the Senate bill made no mention of the standard for pre-enforcement review. See S.Rep.No. 91-1282, 91st Cong., 2d Sess. (1970).

The House bill as reported out of committee originally contained no provision concerning pre-enforce-

ment judicial review of standards. See H.R. 16785, 91st Cong., 2d Sess. (1970). In subsequent debate on the floor of the House, Representative Steiger, in proposing a substitute bill (known as the Steiger-Sykes Amendment), noted of the committee version that "in standard-setting, there is no provision for judicial review." 116 Cong. Rec. H10680 (daily ed., Nov. 24, 1970). Thus, the proposed substitute bill, as finally adopted on the House floor, provided for pre-enforcement judicial review of standards and specified that "review by the court shall be in accordance with the provisions of Section 706 of Title 5 of the United States Code." H.R. 16785, 91st Cong., 2d Sess. §13(c) (1970); 116 Cong. Reg. H10697 (daily ed., Nov. 24, 1970). As Section 7(a)(3) of the bill required standards to be promulgated "upon the entire record" before the Secretary, the resulting standard of review would have been the "substantial evidence" standard under Section 706(2)(E). This conclusion is reinforced by the fact that an earlier version of the House bill had provided for substantial evidence review of the Secretary's findings of fact in the promulgation of standards. H.R. 17748, 90th Cong., 2d Sess. §3(d)(4) (1968); see H.R. Rep. No. 1720, 90th Cong., 2d Sess. 25 (1968). In any event, the Conference Committee adopted the previously quoted language of the Act which was finally passed by both houses.

At one point in time, the Government made much of an alleged ambiguity in the Conference Report, where the House managers state:

> "The 'substantial evidence' test was the basis of court review in the House amendment; in the Senate bill, the more vigorous standards generally applicable to review of rules would have been applicable. Review of the local court of appeals, the use of the 'substantial evidence' test, and a 60-day limitation on the appeal time were accepted by the conferees." H.R. Rep. No. 91-1765, Conference Report, 91st Cong., 2d Sess. 36 (1970).

In earlier litigation involving this passage, the Government contended that the conferees mistakenly assumed that "standards generally applicable to review of rules" (the arbitrary and capricious standard) were "more vigorous" and that the quote shows that the conferees intended to adopt what they considered the weaker standard for review. The courts to which this argument was presented refused to accept it. Speaking for the Second Circuit in *Associated Industries of New York State, Inc.* v. *Department of Labor*, 487 F.2d 342 (1973), Judge Friendly found that:

> "Whatever the explanation of the House managers' having said 'more vigorous' rather than 'less vigorous,' the intention to adopt the substantial evidence test for review as a tradeoff for the House's abandoning its insistence on rulemaking on the record, which would automatically have invoked that test under 5 U.S.C. §706(2)(E), is apparent." 487 F.2d at 349.

The Fifth Circuit, in *Florida Peach Growers Ass'n* v. *Dep't of Labor*, 489 F.2d 120 (1974), likewise explained:

> "The conferees accommodated the Senate's desire for administrative convenience and flexibility by accepting informal rulemaking procedures, but placated House concern for protection of employers from arbitrary burdens imposed by a massive federal bureaucracy, but [sic] adopting the substantial evidence test for judicial review. Thus . . . Congress applied that test as a result of a legislative tradeoff." 489 F.2d at 128.

Regardless of the interpretation of this ambiguity in the Conference Report, the statute does say "substantial evidence," and the excerpt from the Conference Report demonstrates that the inclusion of the substantial evidence standard was the result of a legislative tradeoff specifically designed to insure adequate protection of employers and thus was meant to apply to all standard-setting decisions of the Secretary.

An apparent error in the presentation of Section 6(f) as reported to the respective houses out of the Conference Committee may add some weight to the contention that the substantial evidence standard governs all types of decisions. The Conference Committee's final version of Section 6(f), as introduced in the House by Representative Perkins on December 16, 1970, was identical to the previously quoted provision now contained in 29 U.S.C. §655(f):

> "The *determinations* of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 116 Cong. Rec. H11803 (daily ed., Dec. 16, 1970) (emphasis supplied).

The final version of Section 6(f) as introduced on the same date in the Senate by Senator Williams of New Jersey, however, reads as follows:

> "The *findings of fact determinations* of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 116 Cong. Rec. S20272 (daily ed., Dec. 16, 1970) (emphasis supplied).

It seems incredible that the language of Section 6(f), ostensibly introduced as part of a common conference report, could vary in such a manner. No one

seems to have noticed the difference. It is not mentioned in either the conference report or the floor remarks preceding acceptance of the Conference Committee's bill. The origin of the language "findings of fact determinations" is anyone's guess. It could have come from the previously mentioned 1968 version of the House bill. See H.R. 17748, 90th Cong., 2d Sess. §3(d)(4) (1968). It could have originated with the conferees. At any rate, it is certain, from the text of the statute as it presently exists, that this language was ultimately rejected. This implies that the conferees specifically rejected the alternative of limiting the applicability of the substantial evidence standard to the Secretary's findings of fact, and supports the proposition that the substantial evidence standard, as contained in the Act, applies to all types of "determinations" made by the Secretary.

Finally, the argument can be made that the term "determinations of the Secretary" as used in the Act necessarily includes all determinations made in the promulgation of standards; thus only the substantial evidence standard can apply to these determinations. Section 6(b)(1) of the Act, 29 U.S.C. §655(b)(1), provides that the first step in the promulgation of a standard is that the Secretary "determines" that the standard should be promulgated. Likewise, Section 6(e), 29 U.S.C. §655(e), which requires the Secretary to state his reasons for promulgating a standard, is entitled "Statement of Reasons for Secretary's *Determinations*" (emphasis supplied). This argument was well received by the Second Circuit in *Associated Industries of New York State*, 487 F.2d at 348 & n.5. Moreover, there is one supportive piece of legislative history. In urging the House to accept the compro-

mise bill as reported out of the Conference Committee, Representative Steiger, a principal author of the bill, stated:

> "The permanent standards-setting machinery provides for a hearing upon request of an interested person following judicial review, as are other standards promulgated under Section 6, by an appropriate Federal court of appeals. The Secretary's *standard* will be sustained by the court only if it is supported by 'substantial evidence in the record considered as a whole.' " 116 Cong. Rec. H11899 (daily ed., Dec. 17, 1970) (emphasis supplied).

These materials clearly demonstrate that Congress intended the Secretary to produce substantial evidence in support of all determinations made in setting occupational safety and health standards. This requirement is especially applicable to feasibility determinations, which unquestionably concern "matters subject to evidentiary development." Under this approach, guesswork thinly disguised as a "policy determination" is unacceptable because Congress has already *made* the "legislative" decision as to what standards are feasible "on the frontiers of scientific knowledge." Congress has refused to allow the Secretary to venture into the unknown beyond the limits of substantial evidence demonstrating that his standards are feasible. Anything less is bound to produce infeasible standards in violation of the mandate of Section 6(b)(5), precisely the result in the arsenic case. If the Court upholds the "lowest feasible level" policy, it should protect against such a result by requiring the policy to be applied in conformance with the Act's substantial evidence requirement.

CONCLUSION

The split between the circuits on the basic issues raised by this case cannot be resolved without going beyond the narrow cost-benefit question central to the Solicitor's brief. Whatever the economic terminology—cost-benefit, feasibility or other—the question requiring resolution is the extent to which OSHA's cancer policy is subject to the standard-setting and judicial review provisions of the Occupational Safety and Health Act. The course urged by the Solicitor would confer such a high degree of discretion upon the Secretary as to invite arbitrary administrative action and preclude meaningful review. Enforcement of the substantial evidence standard prescribed by Congress would properly limit the scope of the Secretary's discretion in considering the costs and benefits of toxic materials standards.

Respectfully submitted,

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